April 2006

MJI Publications Updates

Adoption Proceedings Benchbook

Crime Victim Rights Manual (Revised Edition)

Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Criminal Procedure Monograph 8—Felony Sentencing

Domestic Violence Benchbook (3rd ed)

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

April 2006

Update: Adoption Proceedings Benchbook

CHAPTER 5

Temporary Placements, Investigation Reports, and the Safe Delivery of Newborns

5.2 Preplacement Assessments

Effective March 2, 2006, 2006 PA 41 amended the law governing preplacement assessments to require a child placing agency to request that an individual seeking a preplacement assessment undergo a physical examination to ensure his or her physical ability to care for an adoptee. Insert the following text on page 161, immediately before subsection (A):

MCL 710.23f(7) provides:

> "A child placing agency shall request an individual seeking a preplacement assessment to undergo a physical examination conducted by a licensed physician, a licensed physician's assistant, or a certified nurse practitioner to determine that the individual is free from any known condition that would affect his or her ability to care for an adoptee. If an individual has had a physical examination within the 12 months immediately preceding his or her request for a preplacement asessment, he or she may submit a medical statement that is signed and dated by the licensed physician, licensed physician's assistant, or certified nurse practitioner verifying that he or she has had a physical examination within the previous 12-month period and is free from any known condition that would affect his or her ability to care for an adoptee. This subsection does not require new or additional third party reimbursement or worker's compensation benefits for services rendered." MCL 710.23f(7).

April 2006

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text after the January 2006 update to page 264:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

April 2006

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Part A—Commentary

2.8 Probable Cause Determination

C. Anticipatory Probable Cause

Insert the following case summary before subsection (D) on page 18:

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US ___, ___ (2006). The United States Supreme Court also held that the condition or event that "triggers" execution of an anticipatory search warrant need not be included in the search warrant itself.

In *Grubbs*, the defendant purchased a child pornography video from an Internet website managed by an undercover postal inspector. A postal inspection officer obtained an anticipatory search warrant conditioned on delivery of the videotape to the defendant's residence and the defendant's receipt of the videotape. The affidavit accompanying the warrant application stated in part:

> "'Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence[.]'" *Grubbs, supra* at ___.

The search warrant given to the defendant at the time it was executed did not include the affidavit or the language used in the affidavit to describe the "triggering" condition. The defendant argued that evidence obtained as a result of the warrant should be suppressed because the warrant was invalid for its failure to specify the condition on which the warrant's execution was based. The Court disagreed:

> "The Fourth Amendment . . . specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.' . . . [The Fourth

Amendment's] particularity requirement does not include the conditions precedent to execution of the warrant." *Id*. at ___.

Part A—Commentary

2.14 Other Exceptions Applicable to Search Warrants

F. Consent

Insert the following text after the second paragraph on page 34:

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US ___, ___ (2006).

April 2006

Update: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Discussion

Insert the following text after the first full paragraph near the top of page 42:

In *People v Frazier*, ___ Mich App ___, ___ (2006), a defendant's Sixth Amendment right to counsel was violated when the defendant's attorney "purposefully and unreasonably left his client to face the police interrogations alone." The defendant's subsequent waiver of his right to counsel was presumptively invalid, and statements made by the defendant during those interrogations were inadmissible against the defendant in the prosecution's case-in-chief.

Part 2—Individual Motions

6.22 Motion to Disqualify Judge

Discussion

Insert the following text after the partial paragraph near the top of page 54:

A defendant is not denied his right to a fair and impartial trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues his disruptive verbal outbursts. *People v Conley*, ___ Mich App ___, ___ (2006).

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy—Multiple Punishments for the Same Offense

Discussion

Insert the following text before the last paragraph in the section near the bottom of page 62:

Where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law, the Legislature clearly intended to allow multiple punishments for criminal conduct occurring during the same incident from which a defendant's home invasion conviction arose. *People v Conley*, ___ Mich App ___, ___ (2006). Therefore, in *Conley*, the defendant's convictions of first-degree home invasion and felonious assault did not violate the defendant's constitutional protection against double jeopardy. *Id*.

April 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

K. OV 10—Exploitation of a Vulnerable Victim

2. Case Law Under the Statutory Guidelines

Vulnerability—age of the victim.

Insert the following text after the partial paragraph at the top of page 62:

A five-year age difference between a defendant and a complainant may justify a score of ten points for OV 10. *People v Johnson*, ___ Mich ___, ___ (2006). In *Johnson*, the Michigan Supreme Court stated:

> "We also agree that the trial court did not err in scoring OV 10 at ten points. . . . As the Court of Appeals explained, '[w]here complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault [citation omitted].'" *Johnson, supra* at ___.

8.6 Scoring an Offender's Offense Variables (OVs)

L. OV 11—Criminal Sexual Penetration

2. Case Law Under the Statutory Guidelines

Insert the following text after the November 2005 update to page 66:

In *People v Johnson*, ___ Mich ___, ___ (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of first-degree criminal sexual conduct (CSC-1). In *Johnson*, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox*,* the defendant in *Johnson* was charged with and convicted of CSC-1 for each penetration. In *Cox*, 25 points were appropriately scored because the two penetrations/convictions arose from the same sentencing offense. In contrast to *Cox*, however, neither of the penetrations in *Johnson* arose from the same sentencing offense. In *Johnson*, the penetrations occurred on different dates. In the absence of any evidence that the defendant's conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-1 offenses for which the defendant was sentenced. Therefore, because the two penetrations in *Johnson* did not arise from the sentencing offense, the trial court erred in scoring OV 11 at 25 points instead of 0 points.

**People v Cox*, 268 Mich App 440 (2005), discussed in the November 2005 update to page 66.

8.6 Scoring an Offender's Offense Variables (OVs)

N. OV 13—Continuing Pattern of Criminal Behavior

2. Case Law Under the Statutory Guidelines

In *People v Francisco*, ___ Mich ___ (2006), the Michigan Supreme Court ruled that the issue involving OV 13 was wrongly decided in *People v McDaniel*, 256 Mich App 165 (2003). Therefore, on page 70, delete the first paragraph in this sub-subsection and insert the following text:

In *People v Francisco*, ___ Mich ___, ___ (2006), the Michigan Supreme Court ruled that the five-year period to which OV 13 refers must include the sentencing offense. OV 13 assesses points when a sentencing offense is part of a pattern of felonious activity. According to MCL 777.43(2)(a), a pattern consists of three or more crimes committed in a five-year period "including the sentencing offense." In *Francisco*, the trial court scored OV 13 at 25 points for the defendant's three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003.

Based on the plain language of MCL 777.43, the *Francisco* Court explained:

> "[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.
>
> * * *
>
> "Because MCL 777.43(2)(a) states that the sentencing offense 'shall' be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense." *Francisco, supra* at ___.

Part VI—Fashioning an Appropriate Sentence

8.30 Additional Information to Consider Before Imposing Sentence

B. Improper Considerations

Insert the following text after the third bullet on page 146:

Resentencing is required when a sentencing court indicates that the sentencing process "might go a whole lot easier" if the defendant produced the weapon involved in the offense when, although the jury convicted the defendant of felony-firearm, the defendant maintained his innocence of the weapons charge. *People v Conley*, ___ Mich App ___, ___ (2006).

In *Conley*, the defendant admitted to much of the conduct involved in his convictions for first-degree home invasion and felonious assault but he consistently denied that he possessed a weapon at the time of the offenses. At the defendant's sentencing hearing the trial court invited the defendant to further incriminate himself:

> "The trial court did not expressly state that if [the defendant] provided the location of the gun he would receive a lesser sentence. However, the offer of such a quid-pro-quo clearly existed. The trial court stated, '[the defendant] may wish to appeal the conviction, but it might go a whole lot easier if we had the weapon that was discussed in this matter.' Clearly, the implication from this was that [the defendant] would have been sentenced more leniently if he informed the trial court of the gun's location and thereby effectively admitted his guilt." *Conley, supra* at ___.

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Delete the second paragraph of the November 2005 update to page 209 and insert the following text:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005). *People v Buehler*, ___ Mich ___ (2006). The Supreme Court remanded the case to the Court of Appeals to consider two questions:

> "(1) whether the circuit court provided substantial and compelling reasons for imposing a sentence that the circuit court acknowledged was a departure from the guidelines, . . . and (2) whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a."

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

A. Invalid Sentences

Insert the following text after the first bulleted paragraph at the top of page 211:

*See the April 2006 update to page 146 for more information about this case.

Where a trial court implies that it might impose a more lenient sentence if the defendant provided the court with information that required the defendant to effectively admit his guilt, the court "violated [the defendant's] constitutional right against self-incrimination" and the sentence is invalid. *People v Conley*, ___ Mich App ___, ___ (2006).*

The statutory mandate of MCL 769.34(10)—a minimum sentence within the appropriate guidelines range must be affirmed on appeal unless it was based on inaccurate information or a scoring error—does not override the relief due a defendant for a "sentencing error of constitutional magnitude." According to the *Conley* Court:

> "It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions." *Conley, supra* at ___.

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

B. Correcting Invalid Sentences

Insert the following text after the first paragraph near the bottom of page 212:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

C. No Remedy Available, Permitted, or Necessary

Insert the following text after the first full paragraph near the top of page 214:

> **Note:** However, a defendant must be resentenced when the initial sentence is based on a cell range resulting from a scoring error, even if the court's initial sentence falls within the cell range indicated after the error is corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

D. Sentences Imposed Under the Statutory Guidelines

1. Sentences Within the Guidelines Range

Insert the following text after the first paragraph in this sub-subsection on page 215:

See e.g., *People v Conley*, ___ Mich App ___, ___ (2006). Where a sentencing court implies it would be more lenient if the defendant provided the weapon used in the offense even though the defendant has consistently maintained his innocence with regard to weapon use, the court violates the defendant's constitutional right against self-incrimination—an error that overrides the legislative mandate in MCL 769.34(10).

See also *People v Francisco*, ___ Mich ___, ___ (2006). A defendant must be resentenced when his or her sentence is derived from a cell range resulting from a scoring error, even when the sentence imposed is within the cell range indicated after the error is corrected.

April 2006

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

B. Statements by Witnesses Made Unavailable by an Opponent

Insert the following text after the January 2006 update to page 165:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

April 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the January 2006 update to page 112:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

CHAPTER 3

Civil Proceedings

Part III—Discovery (MCR Subchapter 2.300)

3.29 Independent Medical Examinations

B. Report of Physician, Physician's Assistant, or Certified Nurse Practitioner

Effective March 9, 2006, 2006 PA 49 amended the statute governing independent medical examinations to provide that reports from a physician's assistant or certified nurse practitioner must also be delivered to the person examined. Change the title of subsection (B) as indicated above and replace the first sentence at the top of page 192 with the following text:

A copy of the report and findings by the examining licensed physician, licensed physician's assistant or certified nurse practitioner shall be provided to the person examined or his or her attorney, MCL 600.1445(3), and also to the party causing the examination, MCR 2.311(B).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

C. Multiple Punishments for the Same Offense

Insert the following text after the May 2005 update to page 317:

Where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law, the Legislature clearly intended to allow multiple punishments for criminal conduct occurring during the same incident from which a defendant's home invasion conviction arose. *People v Conley*, ___ Mich App ___, ___ (2006). Therefore, in *Conley*, the defendant's convictions of first-degree home invasion and felonious assault did not violate the defendant's constitutional protection against double jeopardy. *Id*.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Consent by third person:

Insert the following text at the bottom of page 342:

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

2. Inevitable Discovery Exception

Insert the following text before the last paragraph in this sub-subsection on page 348:

When a witness's identity is obtained through a violation of the defendant's Sixth Amendment right to counsel, the witness's testimony is inadmissible under the exclusionary rule unless the prosecution establishes an exception to the rule, e.g., that the evidence would have been inevitably discovered by means independent of the constitutional violation. *People v Frazier*, ___ Mich App ___, ___ (2006).

3. Independent Source Exception

Insert the following text after the paragraph in this sub-subsection on page 348:

See also *People v Frazier*, ___ Mich App ___, ___ (2006) (the testimony of witnesses identified during the unconstitutional interrogation of the defendant need not be excluded if the prosecution can establish that the identity of the witnesses would have been discovered by means independent of the constitutional violation).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

F. Anticipatory Search Warrants

Insert the following text after the existing paragraph near the top of page 360:

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US ___, ___ (2006). In *Grubbs*, the United States Supreme Court also held that the condition triggering execution of the warrant need not be stated in the warrant; the Fourth Amendment's "particularity requirement" demands only "the place to be searched" and "the persons or things to be seized" be set forth in a warrant.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

2. Peremptory Challenges

Insert the following text after the partial paragraph at the top of page 407:

By peremptory order dated March 8, 2006, the Michigan Supreme Court vacated *People v Barron (Barron I)*, unpublished opinion per curiam of the Court of Appeals, decided March 22, 2005 (Docket No. 251402), and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *People v Bell*, 473 Mich 275 (2005). *People v Barron (Barron II)*, ___ Mich ___ (2006).

In *Barron I*, the Court of Appeals concluded that error requiring reversal occurred when the trial court wrongly refused to allow the defendant to exercise his final peremptory challenge during jury selection. However, in dicta in *Bell*, the Michigan Supreme Court indicated that a trial court's improper denial of a party's exercise of its peremptory challenges is subject to a harmless error standard of review. *Bell, supra* at 293. According to the Michigan Supreme Court, "to the extent that [it] hold[s] that a violation of the right to a peremptory challenge requires automatic reversal," *People v Schmitz*,* a decision on which the Court of Appeals relied in deciding *Barron I*, is no longer binding precedent. *Bell, supra* at 293.

*231 Mich App 521 (1998). Also cited in the third line of the partial paragraph at the top of page 407.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the January 2006 update to page 415:

The inadmissibility of testimonial evidence as explained in the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36 (2004), does not preclude admission of prior testimony given by a witness made unavailable at trial by the defendant's own conduct. *People v Jones*, ___ Mich App ___, ___ (2006). According to the *Jones* Court:

> "[T]he United States Supreme Court did not intend to deem testimonial hearsay evidence, as in the present case, inadmissible based on a witness's unavailability and the lack of a prior opportunity for cross-examination if the defendant is responsible for procuring the witness's unavailability.
>
> * * *
>
> "Defendant's constitutional right to confrontation is waived under the forfeiture by wrongdoing doctrine if hearsay testimony is properly admitted because the declarant's unavailability was procured by defendant's wrongdoing." *Jones, supra* at ___.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.43 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

3. Gagging

Insert the following text before subsection (B) on page 418:

A defendant is not denied his right to a fair trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues his disruptive verbal outbursts. *People v Conley*, ___ Mich App ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 449:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Insert the following text after the first sentence in the last full paragraph on page 449:

A defendant must be resentenced when he or she is sentenced pursuant to a cell range based on inaccurate guidelines scoring or calculation, even if the sentence imposed under the erroneous cell range is within the cell range indicated after any errors are corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Delete the content of the November 2005 update to page 463 and insert the following:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005), and remanded the case to that Court to consider "whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a."* *People v Buehler*, ___ Mich ___ (2006).

*The Court of Appeals was also ordered to consider whether the trial court gave substantial and compelling reasons for its acknowledged departure from the guidelines.

April 2006

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the May 2005 update to page 364:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

B. Sentencing Guidelines

Insert the following text after the October 2003 update to page 455:

In the absence of any evidence that the defendant's criminal conduct on one occasion arose from his conduct on another occasion, when a defendant is sentenced for more than one conviction of first-degree criminal sexual conduct (CSC-1) and the penetrations forming the basis of each conviction occurred on different dates, those penetrations may not be counted when scoring OV 11 for any of the defendant's CSC-1 convictions. *People v Johnson*, ___ Mich ___, ___ (2006).